

CAN YOU JUST SIGN THIS?

Solicitors' certificates remain the source of many misconceptions by clients and practitioners.

Solicitors' certificates are being provided in an increasing variety of situations, from bank guarantees to binding financial agreements. Despite the prevalence of such forms, clients still don't always understand their significance.

Common client misconceptions about certification include:

- this is like having a passport application witnessed;
- I just have to sign in front of a solicitor;
- this is just a boring "form", an administrative nicety; and
- it's not about my financial bottom line.

Transfer of risk

In the context of mortgages and loans or guarantees, solicitors' certificates are the lender's means of transferring risk to the practitioner and its insurer.

The practitioner is poised for liability if the security provider can challenge the certificate. It is simply a measure of protection for the bank or lender. In the event of a default, it ensures the borrower/guarantor and the solicitor who provided the certificate will be in the gun.

Some practitioners take the view that certification is one of those services they just have to perform, but, as George Gershwin pointed out, "it ain't necessarily so".

The Legal Practitioners' Liability Committee (LPLC) recommends that practitioners provide solicitors' certificates only for existing clients and that they be wary and meticulous with certificates they do decide to provide.

Given the burgeoning incidence of mortgage fraud, there are obvious risks associated with offering this service to people you do not know. Remember that if you have concerns about the client or the transaction, you can always say "no".

If you do decide to witness documents and provide a certificate of explanation, the LPLC recommends that a new file be opened to deal with the matter and that a detailed attendance note be kept, as well as copies of the relevant documents and any forms of identification obtained from the client.

GENERAL REMINDERS

- Explain the general nature and effect of the documents in hand.
- Photo identification is essential to circumvent mortgage and loan fraud.
- If the client's English is limited, use an independent interpreter.
- If there is more than one security provider, advise each separately.
- Advise a surety mortgagor or guarantor in the absence of the borrower.
- Ask why the security provider wants to provide the security and record the reason.
- Be clear that you are not providing financial advice.
- Charge appropriately.
- Open a separate file and keep full file notes: who, what, where, when, etc., and of the advice you give your client.
- Confirm your advice in writing.

Variations from the LIV/ABA form

The Australian Legal Practitioner's Certificates 1 & 2 are available on the LPLC's website in the *Learning From Amadio* booklet, Appendix One (and may be purchased from the LIV bookshop).

It is important that practitioners ensure the wording of any certificate presented matches these recommended forms.

Some lenders alter the certificates in order to expand the warranties being made by the legal practitioner. We have even seen certificates where the practitioner is being required to provide financial advice to the client.

Practitioners do need to scrutinise the wording of the certificate closely to ensure that it does not certify beyond the giving of advice as to the general nature and effect of the documents to be signed.

Binding financial agreements

In the family law context, certification is required for binding financial agreements.

This shifts any risks associated with the invalidity of an agreement onto the legal practitioner.

Strict compliance with the form of certification prescribed under s90G of the *Family*

Law Act 1975 (Cth) is necessary to create a valid, enforceable agreement. The practitioner is required to provide advice about the "advantages and disadvantages" to the party making the agreement.

For more discussion of the risks see the LPLC Risk Management booklet *Focusing on Family Law* (May 2005).

A similar regime for de facto couples should come into effect next month. The *Relationships Act 2008* (Vic) provides a new mechanism for de facto couples to register relationship agreements.

The validity of a relationship agreement depends on a solicitor certifying in terms that the party signing has received independent legal advice and that the certificate is endorsed on, annexed to, or otherwise accompanies the agreement.

Certificates for franchise agreements

The Franchising Code of Conduct requires at cl 11(2) that before a franchise agreement is entered into the franchisor must receive from the prospective franchisee a signed statement that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by an independent legal adviser, business adviser or accountant.

The Code of Conduct contemplates either that an independent adviser sign a statement or that the prospective franchisee acknowledge in writing that they have received advice or elected not to seek advice.

There appears to be no standard form of certificate for franchise agreements.

The LPLC has seen many and varied forms, some in extremely expansive terms and well beyond the provision of legal advice. We recommend that if you do give a certificate, you limit it to wording similar to that in the LIV/ABA approved form of legal practitioner's certificate for mortgagees and guarantors - i.e. limiting your certification to having given advice as to the general nature and effect of the franchise agreement. ●

This column is provided by the LEGAL PRACTITIONERS' LIABILITY COMMITTEE. For further information ph 9670 2001 or visit the website www.lplc.com.au.